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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAKSHI AGRAWAL, LAP T. HUYNH, DAVID P. OLSHEFSKI,
and DINESH VERMA

Appeal 2009-006695
Application 10/713,306
Technology Center 2400

Decided: May 25, 2010

Before JOHN A. JEFFERY, JAMES D. THOMAS, and STEPHEN C. SIU,
Administrative Patent Judges.

SIU, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

This is a decision on appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1-10, 12, and 13. Claim 11 is objected to as

being dependent upon a rejected base claim (Fin. Rej. 2). We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

Invention

The invention relates to measuring the response time of a web server as perceived by clients accessing the web server (Spec. 1).

Independent claim 1 is illustrative:

1. A method of computing response time of a web server, comprising the steps of:

placing a plurality of correlation tags in data at networking and application layers, wherein said tags allow for later identification of said data;

collecting said data from said layers, wherein said data corresponds to a single event;

combining said data from said networking and application layers into a metric, wherein said data corresponding to a single web event is identified; and

calculating client perceived response time.

Reference

The Examiner relies upon the following reference as evidence in support of the rejection:

Fraenkel

US 2003/0065986 A1

Apr. 3, 2003

Rejection

Claims 1-10, 12, and 13 are rejected under 35 U.S.C. § 102(e) as being anticipated by Fraenkel.

ISSUES

Issue 1

The Examiner finds “that the features upon which applicant relies . . . are not recited in the rejected claim(s)” (Ans. 6).

Appellants submit that “Fraenkel does not teach or disclose page view response time, embedded objects, or simultaneous TCP [Transmission Control Protocol] connections; Fraenkel only discloses transaction response time” (App. Br. 6).

Issue: Did the Examiner err in finding that the claimed invention does not require page review response time, embedded objects, or simultaneous TCP connections?

Issue 2

The Examiner finds “the features upon which applicant relies (i.e., server side measurements) are not recited in the rejected claim(s)” (Ans. 8).

Appellants submit that “Fraenkel uses measurements performed at an agent side” (App. Br. 6).

Issue: Did the Examiner err in finding that the claimed invention does not require server-side measurements or modeling?

Issue 3

Appellants submit that the claimed correlation tags and identifiers are sent directly between the client and server (App. Br. 6, 9), but that in Fraenkel, the data is transmitted between agents and servers (*id.*).

Issue: Did the Examiner err in finding that Fraenkel teaches sending data directly between a client and server?

Issue 4

The Examiner finds that “Fraenkel discloses agents on client machines simulating the actions of actual users . . . of the transactional server while monitoring and reporting the server’s performance” (Ans. 9).

Appellants submit that “Fraenkel measure transaction response time, i.e. the time taken for the application to complete a defined transaction or business process” (App. Br. 6). Appellants further submit that “agents that simulate actions are not and cannot be equated with actual web servers that measure response times for actual clients” (Reply Br. 5).

Issue: Did the Examiner err in finding that Fraenkel teaches calculating or estimating client perceived response time of a web server?

FINDINGS OF FACT

The following Findings of Fact (FF) are shown by a preponderance of the evidence:

1. Fraenkel teaches interactions between an “AGENT or other CLIENT” and a “SERVER” (¶ [0145]; Fig. 25) in which, “[i]n state 146, the first page request of the transaction is made by the

agent 32” (§ [0148]) and in which the server sends a first data packet followed by more data (Fig. 25).

2. Fraenkel discloses “agent components that monitor and report various performance parameters associated with [a] transactional server, such as response times seen by end users” (Abstract). A transactional server can include web server functionality (Fig. 1).

PRINCIPLES OF LAW

Claim interpretation

“In the patentability context, claims are to be given their broadest reasonable interpretations. . . . [L]imitations are not to be read into the claims from the specification.” *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) (citations omitted). A claim meaning is reasonable if one of ordinary skill in the art would understand the claim, read in light of the specification, to encompass the meaning. *See In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Any special meaning assigned to a term “must be sufficiently clear in the specification that any departure from common usage would be so understood by a person of experience in the field of the invention.” *Multiform Desiccants Inc. v. Medzam Ltd.*, 133 F.3d 1473, 1477 (Fed. Cir. 1998).

A preamble recitation that merely expresses the purpose of the invention is non-limiting when the invention is fully set forth in the body of the claim. *See Bristol-Myers Squibb Co. v. Ben Venue Labs., Inc.*, 246 F.3d 1368, 1375 (Fed. Cir. 2001).

Anticipation

In rejecting claims under 35 U.S.C. § 102, “[a] single prior art reference that discloses, either expressly or inherently, each limitation of a claim invalidates that claim by anticipation.” *Perricone v. Medicis Pharm. Corp.*, 432 F.3d 1368, 1375 (Fed. Cir. 2005) (citation omitted).

ANALYSIS

Issue 1

Appellants argue that Fraenkel does not teach page review response time, embedded objects, or simultaneous TCP connections. The Examiner finds that the claims do not recite these features. Based on Appellants’ arguments in the Appeal Brief, we will decide the appeal of claims 1-10, 12, and 13 with respect to this issue on the basis of claims 1, 4, 12, and 13. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Appellants argue that the “claims recite collecting data from networking and application layers” (Reply Br. 2). This argument is inapplicable to claims 4, 12, and 13, which fail to recite networking and application layers. Thus, with respect to claims 4, 12, and 13, Appellants fail to identify claim language in support of their arguments with respect to this issue.

Claim 1 does include the limitation of collecting data from networking and application layers. Appellants’ arguments are still unpersuasive. The Specification gives examples of data collection at the network layer (Spec. 7-9) and of data collection at the application layer (Spec. 9-10). However,

before listing the examples, the Specification specifies that the extent of data collected at the network and application layer “depends on the specific restrictions placed by an operating environment of the web server hardware 20, for example . . .” (Spec. 7, 9). Thus, the Specification fails to include definitions of networking layer data and application layer data that are sufficiently clear that an artisan would understand collecting data from these layers as requiring page review response time, embedded objects, or simultaneous TCP connections.

For at least these reasons, we find no evidence persuasive of error in the Examiner’s 35 U.S.C. § 102(e) rejection of claims 1, 4, 12, and 13, and claims 2, 3, and 5-10 which fall therewith.

Issue 2

Appellants argue that Fraenkel fails to teach server-side measurements or modeling. The Examiner finds that these limitations are not claimed. Based on Appellants’ arguments in the Appeal Brief, we will decide the appeal of claims 1-10, 12, and 13 with respect to this issue on the basis of claims 1, 4, 12, and 13. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Appellants argue that “[a] page view download model performed at the server side accurately describes that which is recited in the claims” (Reply Br. 3). In supporting this argument, Appellants cite to the Specification instead of identifying limiting claim language (*id.*). We reviewed claims 1, 4, 12, and 13, but did not find limitations as to where data is to be collected or where page view downloads are to be modeled.

Claim 1 includes the step of “collecting said data from said layers, wherein said data corresponds to a single event.” Claim 4 includes the step of “estimating client perceived response time of said at least one web server computing devices to a request by said one or more client computing devices connected to the web server device via a network.” Claims 12 and 13 contain limitations similar to claim 4. None of these limitations require server-side measurements or modeling.

For at least these reasons, we find no evidence persuasive of error in the Examiner’s 35 U.S.C. § 102(e) rejection of claims 1, 4, 12, and 13, and claims 2, 3, and 5-10 which fall therewith.

Issue 3

Appellants challenge the Examiner’s finding that Fraenkel teaches sending data directly between a client and a server. Based on Appellants’ arguments in the Appeal Brief, we will decide the appeal of claims 1-10, 12, and 13 with respect to this issue on the basis of claim 1 alone. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Appellants argue that Fraenkel does not anticipate the claimed invention because it discloses that data is transmitted between agents and servers (App. Br. 6, 9). Yet, Fraenkel teaches interactions between an “AGENT or other CLIENT” and a “SERVER” (FF 1). Fraenkel’s agents are specialized clients (clients used to measure performance), but the agents are clients nonetheless. Because Appellants fail to distinguish Fraenkel’s agents from the claimed clients, we find Appellants’ arguments unconvincing.

For at least these reasons, we find no evidence persuasive of error in the Examiner's 35 U.S.C. § 102(e) rejection of claims 1, 4, 12, and 13, and claims 2, 3, and 5-10 which fall therewith.

Issue 4

Appellants argue that the Examiner erred in finding that Fraenkel teaches calculating or estimating client perceived response time of a web server. Based on Appellants' arguments in the Appeal Brief, we will decide the appeal of claims 1-10, 12, and 13 with respect to this issue on the basis of claims 1, 4, 12, and 13. *See* 37 C.F.R. § 41.37(c)(1)(vii).

The Examiner finds that "the recitation 'measure the response time of a web server' has not been given patentable weight because the recitation occurs in the preamble" (Ans. 10). Claim 1's preamble recites "[a] method of computing response time of a web server." The preambles of claims 12 and 13 are similar to the preamble of claim 4. These preambles express the purpose of the claimed invention. However, the bodies of the claims do not refer back to these preamble recitations. Instead, the bodies of the claims appear to fully set forth the invention. Thus, Appellants' arguments are not commensurate with the scope of the claimed invention.

Even if patentable weight were given to these preamble recitations, we would still be unconvinced. Fraenkel discloses monitoring and reporting various performance parameters associated with a transactional server that includes web server functionality, including response times seen by end users (FF 2). Therefore, Fraenkel teaches calculating or estimating

(monitoring and reporting) client perceived response time (response times seen by end users) of a web server (a transactional server that includes web server functionality).

For at least these reasons, we find no evidence persuasive of error in the Examiner's 35 U.S.C. § 102(e) rejection of claims 1, 4, 12, and 13, and claims 2, 3, and 5-10 which fall therewith.

CONCLUSIONS OF LAW

Based on the findings of facts and analysis above, we find no evidence persuasive of error:

1. in the Examiner's finding that the claimed invention does not require page review response time, embedded objects, or simultaneous TCP connections (issue 1);
2. in the Examiner's finding that the claimed invention does not require server-side measurements or modeling (issue 2);
3. in the Examiner's finding that Fraenkel teaches sending data directly between a client and server (issue 3); and
4. in the Examiner's finding that Fraenkel teaches calculating or estimating client perceived response time of a web server (issue 4).

DECISION

We affirm the Examiner's decision rejecting claims 1-10, 12, and 13 under 35 U.S.C. § 102(e).

Appeal 2009-006695
Application 10/713,306

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

msc

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